

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

U.S. REAL ESTATE CO., INC.,

Plaintiff,

vs.

Case No. 2013-5001-CZ

BURNS AND WILCOX, LTD., and CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON,

Defendants.

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OPINION AND ORDER

Defendant Certain Underwriters at Lloyd's, London ("Defendant Underwriters") has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied.

Facts and Procedural History

Plaintiff purchased insurance for its commercial office building (the "Policy"). On or about May 24, 2013, the building suffered water damage as a result of damage to a pipe in the building. The cause of the damage is in dispute. Plaintiff then provided Defendant Underwriters with notice of the loss on or about May 24, 2013. On July 25, 2013, Defendants denied coverage under the Policy. Defendants' denial was allegedly based on an exclusion covering water damage.

On December 19, 2013, Plaintiff filed its complaint in this matter alleging claims for breach of contract (Count I), violation of the Michigan Consumer Protection Act (Count II), and declaratory relief (Count III). On February 13, 2014, Defendant Underwriters filed its instant motion for summary disposition based on its assertion that Plaintiff's claims are barred by the

exclusions contained in the Policy. On February 19, 2014, Plaintiff voluntarily dismissed its claims against Defendant Burns and Wilcox, Ltd. without prejudice. On April 7, 2014, Plaintiff filed its response to the motion. Defendant Underwriters has subsequently filed a reply brief in support of its motion.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

Arguments and Analysis

The primary dispute between the parties is the scope of Defendant Underwriters' liability under the Policy. Specifically, the parties disagree as to whether Plaintiff's insurance claims are barred by the water damage exclusions in the Policy.

To determine whether an insured is entitled to insurance benefits, the Court must employ a two-part analysis. First, the Court must determine whether the policy provides coverage to the insured. *Buczkowski v Allstate Ins Co*, 447 Mich 669, 682; 526 NW2d 589 (1994). If it does, the Court must then ascertain whether that coverage is negated by an exclusion. *Id.* It is the insured's

burden to establish that his claim falls within the terms of the policy. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395; 531 NW2d 168 (1995)

With respect to whether the Policy provides coverage for water damage, the first page of the Policy provides that water damage is not covered and that the limit of coverage for water damage is “\$0”. In its response, Plaintiff contends that damage was caused by vandalism and that vandalism is covered by the Policy. (*See* Defendant Underwriters’ Exhibit A.) However, even if Plaintiff is correct that the damage suffered in this case falls within the coverage for vandalism, the coverage must not be negated by an exclusion in order to warrant coverage.

The exclusions to coverage are addressed in section B of the Policy. Section B(2) provides that “[w]e will not pay for loss or damage caused by or resulting from any of the following:.” Subsection B(2)(g) covers water damage. However, that subsection has since been replaced by an endorsement titled “Water Damage Exclusion” (“ATR-113”), which provides:

g. Water

4. Rupture or bursting of water pipes.

5. Leakage or discharge of water or steam from any part of a system or appliance containing water or steam including continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.

This exclusion applies regardless of whether any of the above, in Paragraphs 1 through 7, is caused by an act of nature or is otherwise caused.

Defendant Underwriters contends that the damage caused was the result of the pipe at issue being ruptured, and that as a result ATR-113 applies regardless of whether the rupture was the result of vandalism.

In response, Plaintiff contends that water damage is only excluded if it is caused by accident. In support of its position, Plaintiff relies on section G(2)(c) of the Policy. Section G(2)(c) provides:

2. “Specified Causes of Loss” mean the following: Fire, lightning, explosion, windstorm or hail; smoke, aircraft or vehicles; riot or civil commotion, vandalism, leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

c. Water Damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

Plaintiff asserts that because the damage at issue was not accidental in nature it does not qualify as water damage. The definition of water damage in subsection (c) defines the scope of one “specified cause of loss.” The term “specified causes of loss” is used in some of the exclusions as a means to create an exception to the exclusion. (See Policy at B(2)(d)(“But if an excluded cause of loss in 2.d.(1) through (7) results in a “specified cause of loss: or building glass breakage, we will pay for the loss or damage caused by that “specified cause of loss” or building glass breakage”)) However, the term is not used in section B(2)(g) of the Policy or in ATR-113. Accordingly, the Court is convinced that the definition in the Policy does not apply to water damage in general or contradict the unambiguous language of the ATR-113. Further, under ATR-113 any damage caused by the rupture or bursting of pipes is excluded from coverage regardless of the cause of the water damage. Consequently, the damage at issue is excluded from coverage by the Policy. As a result, Defendant Underwriters’ motion must be granted.

Conclusion

For the reasons set forth above, Defendant Certain Underwriters at Lloyd's, London's motion for summary disposition pursuant to MCR 2.116(C)(10) is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: May 1, 2014

JCF/sr

Cc: *via e-mail only*

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